

SUPREME COURT, U. S.

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IN THE

MICHAEL ROBAX, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5280

PRINCE ERIC FULLER,

Petitioner,

v.

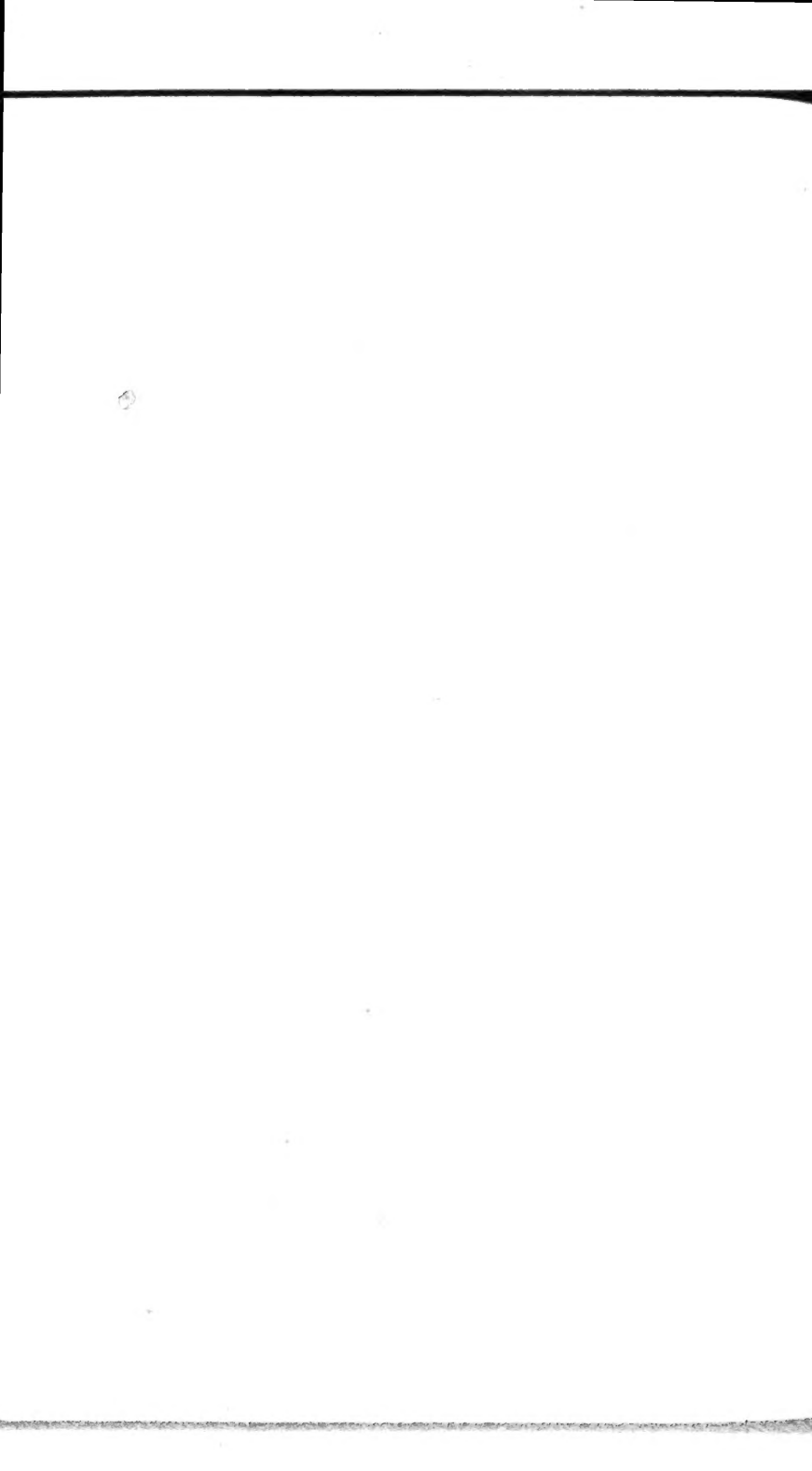
STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF OREGON

BRIEF FOR PETITIONER

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(i)

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OPINION BELOW

The decision of the Court of Appeals of the State of Oregon in this case is reported at 96 Or Adv Sh 457, 504 P2d 1393 (1973), and appears in the printed appendix at page 7. There was no opinion in this case in the Supreme Court of Oregon. (See A. 18).

**STATEMENT OF THE GROUNDS ON WHICH THE
JURISDICTION OF THE COURT IS INVOKED**

The petitioner in this case was convicted of a felony upon a plea of guilty in the Circuit Court of the State of Oregon for the County of Multnomah. The petitioner was

subsequently placed on a term of five years' probation, one of the conditions being that he repay the cost of his court-appointed attorney's fees together with the cost of the defense attorney's investigator's fees. The contention of petitioner that these conditions of probation violated his rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was rejected on the merits by the Court of Appeals of the State of Oregon (A. 7), and review was denied by the Supreme Court of Oregon (A. 18). The jurisdiction of this Court over this cause is conferred by 28 U.S.C. §1257(3).

The decision of the Supreme Court of Oregon declining to review this case was rendered on May 22, 1973. A motion for leave to proceed *in forma pauperis* and a petition for writ of certiorari were filed in this Court on August 15, 1973. Both the motion and petition were granted on December 17, 1973.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Sixth and Fourteenth Amendments to the United States Constitution and Sections 161.665; 161.675; and 161.685 of the Oregon Revised Statutes.

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtain-

ing witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Revised Statute Section 161.665 provides:

"(1) The court may require a convicted defendant to pay costs.

"(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

"(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

"(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it

appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675."

Oregon Revised Statute Section 161.675 provides:

"(1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified instalments. If no such permission is included in the sentence the fine shall be payable forthwith.

"(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs a condition of probation or suspension of sentence."

Oregon Revised Statute Section 161.685 provides:

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any instalment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

"(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

"(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the

assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

"(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each \$25 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

"(5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

"(6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected."

THE QUESTIONS PRESENTED

1. Does the requirement that an indigent criminal defendant reimburse the county for his court-appointed attorney's fees as a condition of probation violate the equal protection and due process clauses of the United States Constitution?

2. Is a requirement that an indigent criminal defendant repay to the county the cost of his court-appointed attorney's fees an impermissible restriction of the right to counsel as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States?

STATEMENT OF THE CASE

On July 20, 1972, the petitioner waived his right to grand jury and entered a plea of guilty to the Multnomah County, Oregon, district attorney's information charging him with the crime of third degree sodomy (A. 2). At the time of sentencing, it was determined that petitioner had no prior criminal record except for one misdemeanor trespass conviction and that at the time petitioner was arrested he was a student at the Portland Community College (A. 3). Petitioner financed his schooling through the G.I. Bill and by selling posters and silk work done by friends of his (A. 3-4).

The Multnomah County circuit court suspended imposition of sentence and placed petitioner on a term of five years' probation including the conditions that petitioner pay to the county the cost of his court-appointed attorney's fees and \$375 for the cost of the defense attorney's investigator (A. 4-5).

The Court of Appeals of the State of Oregon rejected petitioner's claims that the above conditions of probation denied petitioner due process and equal protection of the laws and that the terms of probation did not deny to petitioner his right to counsel (A. 7).

SUMMARY OF ARGUMENT

A requirement that an indigent criminal defendant reimburse the county for his court-appointed attorney's

fees as a condition of probation violates the equal protection and due process clauses of the United States Constitution because it constitutes an invidious discrimination between the indigent and the well-to-do defendant.

Section 161.675(2) of the Oregon Revised Statutes applies to convicted indigents only and does not apply to those indigent defendants whose cases were dismissed or who were acquitted after trial by jury. Further, the statute has been applied only to require those placed on probation to repay the county for the costs of their court-appointed attorney and has not been applied to those convicted indigents who were sentenced to terms of imprisonment.

The Oregon statutes fail to provide petitioner with the statutory exemptions provided other Oregon debtors and also fail to provide petitioner with adequate notice of his possible liability as well as failing to provide a means whereby the petitioner may contest the unreasonableness of the fees charged.

A requirement that an indigent criminal defendant repay to the county the cost of his court-appointed attorney's fees is an impermissible burden upon the right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution in that it tends to inhibit a defendant from exercising this constitutional right.

ARGUMENT

I.

A REQUIREMENT THAT AN INDIGENT CRIMINAL DEFENDANT REIMBURSE THE COUNTY FOR HIS COURT-APPOINTED ATTORNEY'S FEES AS A CONDITION OF PROBATION VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Subsequent to petitioner entering the plea of guilty to the charge of sodomy in the third degree, the Multnomah County Circuit Court placed the petitioner on probation for a period of five years, imposing as a condition of that probation the requirement that petitioner pay the cost of his court-appointed attorney's fees as well as a total of \$375 for the cost of the defense attorney's investigator (A. 4-5). Petitioner believes that such a condition is unreasonable because it is grossly unfair for the state to try and convict an indigent defendant after appointing him counsel and then requiring him to pay the cost of that counsel. Petitioner submits that this denies him equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

As pointed out in the dissenting opinion of Judge Fort, the condition of probation imposed in the instant case constitutes an "invidious discrimination between the indigent and the well-to-do defendant."

In *James v. Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed2d 600 (1972), this Court concluded that a Kansas statute relating to recoupment from an indigent defendant was unconstitutional because that statute denied defendant equal protection in that it did not allow him certain exemptions from execution provided for other

debtors. As so aptly pointed out by Judge Fort in his dissenting opinion, nothing in ORS 161.675(2) affords the petitioner in a revocation proceeding the exemptions provided other debtors generally under Oregon law. Since the Oregon statute (ORS 161.675(2)) fails to provide petitioner with the statutory exemptions provided other Oregon debtors, the Oregon statute can stand on no firmer ground than that statute declared unconstitutional by this Court in *James v. Strange*, supra, and so denies petitioner equal protection of the laws.

The Oregon Court of Appeals, in its majority opinion, decided that the court-appointed attorney's fees and investigatory expenses were "costs" as defined by ORS 161.665(2), and so were appropriately assessed against petitioner and that their repayment could properly be made a condition of probation pursuant to ORS 161.675(2) (A. 10-11). The court then distinguished the Oregon statute from the Kansas statute condemned in *James v. Strange*, supra, by stating that, "... No denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes" (A. 12). However, as Judge Fort perceived in his dissenting opinion, the Oregon statutes allowing recoupment of costs do not afford the petitioner in a revocation proceeding the exemptions provided debtors generally under Oregon law.¹ This failure to provide petitioner

¹ ORS 137.550 provides:

(1) Subject to the limitation in ORS 137.010:

(a) The period of probation shall be such as the court determines and may, in the discretion of the court, be continued or extended.

(b) The court may at any time discharge a person from probation.

with such exemptions denies him equal protection of the laws.

The Oregon Court of Appeals further reasoned that the reimbursement of a criminal defendant's court-appointed attorney's fees as a condition of probation did not deny to the indigent defendant due process or equal protection of the laws because a revocation may only occur when the court finds that the defendant has the ability to repay

(2) At any time during the probation period, the court may issue a warrant and cause a defendant to be arrested for violating any of the conditions of probation. Any probation officer, police officer or other officer with power of arrest may arrest a probationer without a warrant, and a statement by the probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation is sufficient warrant for the detention of the probationer in the county jail, house of detention or local prison, when designated in such statement, until the probationer can be brought before the court. The probation officer shall forthwith report such arrest or detention to the court and submit to the court a report showing in what manner the probationer has violated his probation. Thereupon the court, after summary hearing, may revoke the probation and suspension of sentence and cause the sentence imposed to be executed or, if no sentence has been imposed, impose any sentence which originally could have been imposed. A defendant who has been previously confined in the county jail as a condition of probation pursuant to ORS 137.540 shall be given credit for all time thus served in any order or judgment of confinement resulting from revocation of his probation. In the case of any defendant whose sentence has been suspended but who is not on probation, the court may issue a warrant and cause the defendant to be arrested and brought before the court at any time within the maximum period for which the defendant might originally have been sentenced. Thereupon the court, after summary hearing, may revoke the suspension of sentence and cause the sentence imposed to be executed.

the costs and his failure to repay was an "intentional contumacious default". This, defendant submits, does not resolve the problem but only begs the question since the statute itself, in petitioner's opinion, is a denial of equal protection and no amount of legal legerdemain by the court can save it.

Petitioner submits that ORS 161.665 is patently unconstitutional since its language expressly applies only to those indigent defendants who have been convicted of crime, and does not apply to those indigent defendants who, although they may have been represented by court-appointed counsel, were fortunate enough to have their cases dismissed or who were acquitted after trial by jury. Petitioner also submits that as a practical matter very few Oregon penitentiary inmates have been required to reimburse the county for the cost of their court-appointed attorney if they have been sentenced to either the Oregon State Penitentiary or the Oregon State Correctional Institution.

In *Rinaldi v. Yeager*, 384 US 305, 86 S Ct 1497, 16 L Ed2d 577 (1966), this Court held unconstitutional a New Jersey statute that authorized the county treasurers to recover the costs incurred in preparing a trial transcript for an indigent defendant for the purposes of appellate review. It was noted that the New Jersey statute did not impose the same financial burden upon all convicted defendants, but applied only to those incarcerated in state institutions. This Court held the New Jersey statute violated the equal protection clause, indicating that the Fourteenth Amendment requires more of a state law than nondiscriminatory application within the class established. This Court indicated that the equal protection clause also required some rationality in the nature of the class singled out saying:

“* * * To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination. * * *”

Petitioner submits that this same discrimination is inherent in the Oregon statute since it applies only to convicted defendants and, therefore, denies to the convicted indigent defendant the equal protection of the law.

As did the statute condemned in *Rinaldi v. Yeager*, supra, the Oregon statute serves no defensible interest by focusing only on the convicted defendant if the true purpose of the statute is to provide reimbursement to the county. If the Oregon statute was truly for the purpose of reimbursement, in order to satisfy the requirements of the equal protection clause, it would have to apply to all criminal defendants, whether or not they were convicted. The only requirement should be that the county did provide a court-appointed attorney to the criminal defendant, and the repayment of costs should not depend solely on whether or not the indigent was unsuccessful in his defense.

A thorough review of the record in the instant case indicates that the state has failed to produce any compelling governmental interest or the need to recover the expenses of providing a defense for indigent defendants or, if such a need exists, that collections should be made by the judiciary through the use of probationary conditions. As the California Supreme Court noted in *Ingram v. Justice Court for Lake Valley Judicial District*, 73 Cal Rptr 410, 416 (1968):

“... [T]he fundamental flaw in the People's position is its unstated assumption that the courts are the guardians of the county coffers. In our system of government this is not, and should not be, their role. The Constitution and the statutes commit that

responsibility, more appropriately, to the board of supervisors, assisted by such officers as the district attorney, the county counsel, the treasurer, the controller and auditor and the inquisitorial body of citizens, the grand jury."

Even if the state had shown that its fiscal situation required a compelling reason for recoupment, petitioner submits that making an indigent repay his court-appointed attorney's fees and investigation expenses as a condition of probation is not a proper method to insure reimbursement.

Petitioner believes that reimbursement to the county of his court-appointed attorney fees and investigator fees denies him due process of law because such conditions have no relationship to the crime for which he was convicted; have no relation to conduct not itself criminal; and requires conduct not reasonably related to future criminality. *In re Bushman*, 1 Cal3d 767, 83 Cal Rptr 375, 463 P2d 727 (1970); *State v. Baynard*, 4 N.C. App 465, 167 SE2d 514 (1969).

The Oregon court attempted to justify the recoupment of attorney fees through the medium of probation by comparing them to restitution to the victim of the crime as allowed by ORS 137.540,² and that such repayment

² ORS 137.540 provides:

The court shall determine, and may at any time modify, the conditions of probation, which may include, as well as any others, that the probationer shall:

- (1) Avoid injurious or vicious habits.
- (2) Avoid places or persons of disreputable or harmful character.
- (3) Report to the probation officer as directed by the court or probation officer.

could very well be considered rehabilitative (A. 12). The court then reasoned that a defendant should not have the right to refuse to make payment of the costs or to make restitution imposed against him as a result of his own misconduct. Petitioner believes the fatal fallacy in the court's reasoning is readily apparent. One, the reimbursement of the cost of his court-appointed attorney's fees needlessly impinges upon the defendant's constitutional right to counsel and impinges on the free exercise of this right (see Argument II, *infra*); and two, when a defendant is forced to make restitution to the victim of his crime, no constitutional right of his is violated. Further, a defendant who is ordered to make restitution has knowledge of the amount involved while an indigent who must reimburse the county for the cost of his defense not only has no idea of what the cost may be, but is given no opportunity to contest the amount of the assessments made in terms of the value of the services received. When

(4) Permit the probation officer to visit him at his place of abode or elsewhere.

(5) Answer all reasonable inquiries of the probation officer.

(6) Work faithfully at suitable employment.

(7) Remain within a specified area.

(8) Pay his fine, if any, in one or several sums.

(9) Be confined to the county jail for a period not to exceed one year or one-half of the maximum period of confinement that could be imposed for the offense for which the defendant is convicted, whichever is the lesser.

(10) Make reparation or restitution to the aggrieved party for the damage or loss caused by offense, in an amount to be determined by the court.

(11) Support his dependents.

(12) Remain under the supervision and control of the Corrections Division.

repayment is made a condition of probation, the indigent may even be deprived of his liberty without ever having had a hearing on the reasonableness of the attorney fees or investigatory costs imposed against him. This procedure, or lack of it, in petitioner's opinion, denies him due process of law as guaranteed by the Fourteenth Amendment.

Petitioner also believes that ORS 161.665 is unconstitutional because it fails to provide that a defendant who may be liable under the statute receive notice of the liability or a hearing. *People v. Amor*, 110 Cal Rptr 701, 35 Cal App 3rd 344 (1973). In *People v. Amor*, the California court held that §987.8 of the California Penal Code³ denied defendant due process of law because the statute failed to provide notice to the defendant of the liability or a hearing. The court said:

"... Since a judgment has special ramifications for a defendant and can become a lien against real estate, due process requires that a defendant be notified that his liability is to be in the form of a judgment. ..."

³ §987.8 of the California Penal Code provides:

In any case in which a defendant is furnished counsel, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, the court shall make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. If the court determines that the defendant has the present ability to pay all or part of the cost, it shall order him to pay the sum to the county in any installments and manner which it believes reasonable and compatible with his financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order shall not be enforced by contempt.

In Oregon, a judgment that a criminal defendant pay costs is docketed as a judgment in a civil action and has the same effect. ORS 137.180.⁴ Such judgment then becomes a lien upon all defendant's real property then owned by him or which he may subsequently acquire. ORS 18.350(1). Since a criminal defendant is thus subject to possible loss of property, petitioner believes due process requires adequate notice to him of this very real possibility as well as the right to a hearing to determine the reasonableness of the costs. This ORS 161.665 fails to do, and it thus denies petitioner due process of law. *People v. Amor*, supra.

II.

A REQUIREMENT THAT AN INDIGENT CRIMINAL DEFENDANT REPAY TO THE COUNTY THE COST OF HIS COURT-APPOINTED ATTORNEY'S FEES AS A CONDITION OF PROBATION IS AN IMPERMISSIBLE RESTRICTION OF THE RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Petitioner submits that a condition of probation requiring him to reimburse the county for the cost of his court-appointed attorney's fees is an impermissible burden upon the right to counsel established in *Gideon v. Wainright*, 372 US 335, 83 S Ct 792, 9 L Ed2d 799, 93

⁴ORS 137.180 provides:

"A judgment that the defendant pay money, either as a fine or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect, as provided in ORS 18.320, 18.350 and 18.400."

ALR2d 733 (1963), and recently reinforced by this Court in *Argersinger v. Hamlin*, 407 US 25, 92 S Ct 2006, 32 L Ed2d 530 (1972).

This same issue was considered by the Supreme Court of California in the case of *In re Allen*, 71 Cal2d 388, 78 Cal Rptr 207, 455 P2d 143 (1969). After a discussion of the United States Supreme Court decisions, the California court said:

"We conclude that the imposition of the condition under attack constitutes an impediment to the free exercise of a right guaranteed by the Sixth Amendment to the Constitution and as with respect to other impediments or forms of compulsion against the exercise of such rights may not be permitted by the courts."

The court further reasoned that:

"It would appear utterly inconsistent to advise a defendant of his entitlement to the free service of counsel and later to exact repayment through the medium of a condition of probation. *Miranda*⁵ (P. 491 [16 L Ed2d P. 733]) made clear that where 'rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them.'"

The California court in *In re Allen* also stated:

"We may take judicial notice that judges in San Mateo County and in certain other counties have made use of the method utilized in the case at hand of reimbursing this county's treasury for funds expended in supplying counsel for indigents.

⁵ *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed2d 694 (1964).

Although this concern for the financial burdens imposed upon the counties for such costs is commendable, we believe that as knowledge of this practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the Court in *Gideon, supra*. Although in the instant case there is no indication in the record that petitioner was discouraged from exercising her constitutional right to counsel for, in fact, she requested and received counsel, neither does the record show that she might become indebted to the county for the cost of such service. The fact that such knowledge might have deterred her, and could well deter others, gives rise to our concern as to the validity of such a condition of probation."

Again, in *People v. Johnson*, 104 Cal Rptr 75 (1972), the California Court of Appeal for the Fourth District held such a condition of probation as invalid under the Sixth Amendment to the United States Constitution, saying:

"Moreover, the imposition of reimbursement for the costs of court-appointed counsel as a condition of probation is constitutionally proscribed as an impediment to the free exercise of a Sixth Amendment right. * * *

The Oregon Court of Appeals refused to follow the rule of *In re Allen, supra*, because an indigent in Oregon

is given counsel immediately, and so, the court believed, he is not denied counsel even if he is later required to reimburse the county for the cost of counsel (A. 11-12). Petitioner believes the Oregon court utterly failed to grasp the reasoning of *In re Allen*, supra. The rationale is not only that an indigent will be burdened by the requirement to repay attorney fees, but that the indigent will waive his fundamental right to counsel rather than incur the debt at all. (This is assuming, of course, that the indigent is advised of his possible liability to repay the fees of his court-appointed attorney.) This very real possibility was recognized by the *A.B.A. Project on Providing Defense Services*⁶ when it said at page 59:

"Apart from these constitutional objections, the practice of requiring payment from funds not available at the time of determination of eligibility may serve to discourage the acceptance of counsel by those who are most in need and least able to appreciate the practical consequences of the imposition of such an obligation of reimbursement."

Since the punishment in misdemeanor cases is usually a fine, the counsel fee could very well be higher than the fine imposed by the court on conviction. But the real damage occurs when an indigent defendant chooses to waive counsel and suffers prejudice as a result.

Although this Court in *James v. Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed2d 600 (1972), did not reach the question presented by the instant petitioner, this Court has held that an individual shall not be penalized for asserting a constitutional right.

⁶ A.B.A. Project on Providing Defense Services (Approved Draft 1968).

In *United States v. Jackson*, 390 US 570, 88 S Ct 1209, 20 L Ed2d 138 (1968), this Court held the death penalty provisions of the Federal Kidnapping Act imposed an impermissible burden upon the exercise of the defendant's Fifth Amendment privilege not to plead guilty as well as deterring his exercise of his Sixth Amendment right to demand a trial by jury. The Court, in holding that portion of the statute unconstitutional, said:

"* * * If the provision had no other purpose or affect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. * * *"

This Court held that, even though procedures are not inherently coercive, they still may be such as to impose an impermissible burden upon the assertion of a constitutional right.

This Court, in *Gardner v. Broderick*, 392 US 273, 88 S Ct 1913, 20 L Ed2d 1082 (1968), and *Sanitation Men Asso. v. Commissioner*, 392 US 280, 88 S Ct 1917, 20 L Ed2d 1089 (1968), held that a policeman in *Broderick* and the sanitation men in the latter case could not be dismissed from their positions for asserting their Fifth Amendment privilege to remain silent.

The Fifth Amendment right against self-incrimination was also protected by this Court in *Griffin v. California*, 380 US 609, 86 S Ct 1229, 14 L Ed2d 106 (1965), where the Court held that a criminal defendant could not be penalized for asserting his privilege against self-incrimination. See also *Spevack v. Klein*, 385 US 511, 87 S Ct 625, 17 L Ed2d 574 (1967).

As defined by this Court in *Malloy v. Hogan*, 378 US 1, 84 S Ct 1489, 12 L Ed2d 653 (1964), "penalty" is any sanction that makes assertion of the privilege "costly".

Petitioner can think of nothing more costly than an indigent waiving his right to counsel in order to avoid having repayment of his appointed counsel's fees hanging over his head like a Sword of Damocles for a number of years.

Petitioner, therefore, believes the requirement that an indigent reimburse the county for the cost of his attorney's fees as a condition of probation is an impermissible restriction upon the free exercise of his right to counsel and would inhibit a defendant from exercising this constitutional right. In order to be fully consistent with the Oregon Court of Appeals' opinion in the instant case, petitioner believes that in the future, any time a criminal indigent defendant is advised of his right to court-appointed counsel, in order to ensure a full and adequate understanding of this right, the defendant must also be advised that, should he be convicted of the crime with which he is charged, he might well have to reimburse the county for the costs of his court-appointed attorney's fees. See *Carnley v. Cochran*, 369 US 506, 82 S Ct 884, 8 L Ed2d 70 (1962). This, then, in petitioner's opinion, could well have a "chilling" effect on the indigent exercising his right to counsel as guaranteed by *Gideon v. Wainwright*, *supra*.

This possible "chilling" effect was also noted by the A.B.A. Project, *supra*, when it recommended against reimbursement in its section on eligibility for defense counsel:

"6.4 Reimbursement

"Reimbursement of counsel or the organization or government unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility. (emphasis in original) A.B.A. Project, Approved Draft, (1968), supra, P. 58."

As explanation for its recommendation, the Project report stated at pp. 58, 59:

"A number of jurisdictions impose an obligation upon the accused to pay a fee for services rendered, *when and if he is able*. This obligation is often enforced as a condition of probation. The practice raises serious constitutional questions: Whether due process is denied if the accused is compelled to pay after having been acquitted or if he is not informed of his obligation at the time counsel is provided; whether a waiver of counsel is valid if it is made because of the accused's unwillingness to undertake such an obligation; whether conditioning probation on such payment amounts to imprisonment for debt. See *DEFENSE OF THE POOR* 113-115; Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 Minn. L. Rev. 1, 26 (1963).

"Apart from these constitutional objections, the practice of requiring payment from funds not available at the time of determination of eligibility may serve to discourage the acceptance of counsel by those who are most in need and least able to appreciate the practical consequences of the imposition of such an obligation of reimbursement. Moreover, the amounts which can be collected under such a requirement are negligible, especially if the cost of collection is taken into account." (emphasis added)

In asserting his position, petitioner is aware of the dicta in *Rinaldi v. Yeager*, 384 US 305, 86 S Ct 1497, 16 L Ed2d 577 (1966), to the effect that repayment of costs may be an appropriate condition of probation or parole. Petitioner believes, however, that this dicta should not be persuasive because, as pointed out in *Comment, Reim-*

bursement of Defense Costs as a Condition of Probation for Indigents, 67 Mich. L. Rev. 1404, 1412 (1969):

"[The Supreme Court] cited as support a detailed study which indicated that some judges in our jurisdiction require, as a condition of probation, that the convicted indigent repay the county's expenditure for his lawyer. The persuasiveness of the Court's statement, however, is undercut not only by the lack of analysis, but also by the fact that the study cited in support of that contention expressed grave doubts both as to the constitutionality and as to the wisdom of requiring reimbursement as a condition of probation. Moreover, even if the dicta in *Rinaldi* could be interpreted as approval of such a condition, the fact that the constitutional validity of the condition was not at issue suggests that the question is still open."

By not adhering to the ruling and rationale of *In re Allen*, supra, the Oregon court has placed petitioner in a position where he cannot win. He is damned if he does choose to have counsel appointed for him because, upon receiving probation, he must either make a good faith effort to repay the cost of his defense or face continued imprisonment, and he is damned if he chooses not to have counsel appointed because he does not receive "the guiding hand of counsel" before and during trial.

Petitioner, therefore, believes that a condition of probation imposing upon him the requirement to reimburse the county in the amount of his court-appointed attorney's fees needlessly penalizes the assertion of a constitutional right and is, therefore, unconstitutional. See *Griffin v. California*, supra.

CONCLUSION

For the reasons stated, it is respectfully submitted the judgment of the court below should be reversed.

Respectfully submitted,

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